INDEX

	Page
Opinions below	1
Jurisdiction	2
Statutes involved	2
Question presented	3
Statement	4
The question is substantial	4
Appendix	6-8

CITATIONS

Cases:

United States v. *Borden Co.*, 308 U.S. 188	2
United States v. *Hunt*, No. 674, this Term	4
United States v. *Ludenia Howard*, No. 52, this Term	2
United States v. *Korpan*, 237 F. 2d 676, pending on writ of certiorari, No. 596, this Term	4
United States v. *Ollhoff*, No. 675, this Term	4

Statutes:

Internal Revenue Code of 1954, 26 U.S.C., Supp. III:	
Section 4461	2, 4
Section 4462	3, 4

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. ——

UNITED STATES OF AMERICA

v.

MICHAEL D. MACK

No. —

UNITED STATES OF AMERICA

v.

JOSEPH CALI

No. —

UNITED STATES OF AMERICA

v.

EARL R. EDWARDS

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The orders of the district court dismissing the informations in these cases have not been reported.[1] A copy of each order is set forth in the Appendix, *infra*, pp. 6-8.

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[1] Since all three cases are from the same court and present the same issue, one jurisdictional statement is being filed in accordance with Rule 15 (3) of the Rules of this Court.

JURISDICTION

The order of the district court dismissing the information in *Cali* was entered November 8, 1956; in *Mack* on November 5, 1956, and amended on November 8, 1956; and in *Edwards*, as to Count II of the information, on October 31, 1956, and amended on November 8, 1956. Notices of appeal to this Court were filed on November 30, 1956. The jurisdiction of this Court to review on direct appeal an order dismissing an information, based on a construction of the statute on which the information is founded, is conferred by 18 U.S.C. 3731. *United States* v. *Borden Co.*, 308 U.S. 188; *United States* v. *Ludenia Howard*, No. 52, this Term.

STATUTES INVOLVED

The Internal Revenue Code of 1954, 26 U.S.C., Supp. III, provides in pertinent part:

> Sec. 4461. Imposition of tax.
>
> There shall be imposed a special tax to be paid by every person who maintains for use or permits the use of, on any place or premises occupied by him, a coin-operated amusement or gaming device at the following rates:
>
> (1) $10 a year, in the case of a device defined in paragraph (1) of section 4462 (a);
>
> (2) $250 a year, in the case of a device defined in paragraph (2) of section 4462 (a); and
>
> (3) $10 or $250 a year, as the case may be, for each additional device so maintained or the use of which is so permitted. * * *

Sec. 4462. Definition of coin-operated amusement or gaming device.

(a) *In general.*—As used in sections 4461 to 4463, inclusive, the term "coin-operated amusement or gaming device" means—

(1) any amusement or music machine operated by means of the insertion of a coin, token, or similar object, and

(2) so-called "slot" machines which operate by means of insertion of a coin, token, or similar object and which, by application of the element of chance, may deliver, or entitle the person playing or operating the machine to receive cash, premiums, merchandise, or tokens.

(b) *Exclusion.*—The term "coin-operated amusement or gaming device" does not include bona fide vending machines in which are not incorporated gaming or amusement features.

(c) *1-cent vending machine.*—For purposes of sections 4461 to 4463, inclusive, a vending machine operated by means of the insertion of a 1-cent coin, which, when it dispenses a prize, never dispenses a prize of a retail value of, or entitles a person to receive a prize of a retail value of more than 5 cents, and if the only prize dispensed is merchandise and not cash or tokens, shall be classified under paragraph (1) and not under paragraph (2) of subsection (a).

QUESTION PRESENTED

Whether a pin-ball machine, the operation of which involves the application of an element of chance as the result of which the player may become entitled either to

free plays or money, is the type of gaming device which is subject to the tax imposed by 26 U.S.C., Supp. III, 4461 (2) upon "so-called 'slot' machines" as defined in 26 U.S.C., Supp. III, 4462 (a) (2).

STATEMENT

The information in each of these three cases (Count II in *Edwards*) charged each defendant with permitting upon his premises the use of a coin-operated pinball machine upon which he was required to pay the tax imposed by 26 U.S.C. 4461(2) (*i.e.*, the tax upon a "so-called 'slot' machine" as described in 4462(a)(2), involving application of chance as the result of which the player may be entitled to a premium or cash) and with having willfully refused to pay such tax. The district court, on motion of the defendants, dismissed the information for failure to state an offense, adopting the reasoning of the Court of Appeals for the Seventh Circuit in *United States* v. *Korpan*, 237 F. 2d 676, pending on writ of certiorari granted January 21, 1957, No. 596, this Term. That court had held that no pinball machine is within the definition of a "so-called 'slot' machine" in 26 U.S.C. 4462(a)(2) even though the machine is operated by a coin and, by the application of the element of chance, entitles the player to cash or premiums.

THE QUESTION IS SUBSTANTIAL

The issued presented by these appeals is the same as that raised in the petition for a writ of certiorari in *United States* v. *Korpan*, No. 596, this Term, and on direct appeal from the decision of the District Court for Minnesota in *United States* v. *Hunt* and *United States* v. *Ollhoff*, Nos. 674 and 675, this Term. For the reasons stated in the petition for a writ of certiorari in

Korpan, and the jurisdictional statement in the *Hunt* and *Ollhoff* cases, the question is one which should be resolved by this Court.

Respectfully submitted,

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WARREN OLNEY III,
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BEATRICE ROSENBERG,
Attorney.

JANUARY 1957.

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

OCTOBER 1956 TERM AT PHOENIX

Minute Entry of
THURSDAY, NOVEMBER 8, 1956

(Phoenix Division)

C-14185

UNITED STATES OF AMERICA, PLAINTIFF

vs.

MICHAEL D. MACK, DEFENDANT

Honorable Dave W. Ling, United States District Judge, Presiding

IT IS ORDERED that the order of dismissal heretofore entered on November 5, 1956, is hereby amended to show that this case is dismissed upon the authority of U. S. v. Korpan, United States Court of Appeals 7th Circuit, Cause No. 11669, decided September 28, 1956; and that based upon said authority this court is of the opinion that the machine described in the Information, namely: a pinball machine, is not a gaming device as defined in 26 USCA 4462(a)(2).

A TRUE COPY.

Certified this 8th day of November, 1956.

WM. H. LOVELESS, *Clerk,*
By (S.) KATHERINE CLARK,
Deputy Clerk.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

OCTOBER 1956 TERM AT PHOENIX

Minute Entry of
THURSDAY, NOVEMBER 8, 1956

(Phoenix Division)

C-14186

UNITED STATES OF AMERICA, PLAINTIFF

vs.

JOSEPH CALI, DEFENDANT

Honorable Dave W. Ling, United States District Judge, Presiding

IT IS ORDERED that the Government is granted leave to file a Bill of Particulars herein.

Whereupon, upon consideration of the Bill of Particulars filed by the United States Attorney, and upon the authority of U. S. v. Korpan, U. S. Court of Appeals, 7th Circuit, cause No. 11669, decided September 28, 1956, this court upon the basis of said authority is of the opinion that the machine described in the Information, namely: a pinball machine, is not a gaming device as defined in 26 USCA 4462(a)(2), and

IT IS THEREFORE ORDERED that this case be and it is hereby dismissed.

A TRUE COPY.

Certified this 8th day of November, 1956.

WM. H. LOVELESS, *Clerk*,
By (S.) KATHERINE CLARK,
Deputy Clerk.

U.S.A. *vs.* EARL R. EDWARDS, C-14189, November 8, 1956

IT IS ORDERED that the order granting defendant's motion to dismiss Count II of the Information heretofore entered on October 31, 1956, is hereby amended to show that said order was entered upon the authority of U. S. vs. Korpan, United States Court of Appeals 7th Circuit, cause No. 11669, decided September 28, 1956; and that based upon said authority this court is of the opinion that the machine described in count II of the Information, namely: a pinball machine, is not a gaming device as defined in 26 USCA 4462(a)(2).

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